

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 24 OF 1996
WITH
CIVIL APPLICATION NO. 134 OF 1996

Balkrishna Raghunath Dharmadhikar	
& Ors. Appellants
V/s.	
Nandan Ganapatrao Hawaldar Respondents

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Mr.A.A.Kumbhakoni i/by A.M.Kulkarni, for the appellants.

Mr.G.N.Salunkhe, Advocate, for the respondents.

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CORAM : J.H.BHATIA, J.

DATE : 4th September, 2009.

P.C.

1 The appellant before the Court is admittedly the owner of the suit property which consists of a shop. According to the plaintiff, he was in need of money and therefore earlier on 27th January 1975, he had mortgaged the said shop in favour of brother of the defendant for a particular period. It was usufructury mortgage (self redeeming mortgage as per mortgage deed). After expiry of the mortgaged period, the plaintiff/appellant was not able to repay the loan amount and therefore he took loan from the

present defendant no.1, and mortgaged the said property in favour of the defendant under the mortgaged deed dated 6th April 1981 and the with brother of defendant was redeemed. The second mortgage in favour of the defendant was also usufructury mortgage (self redeeming mortgage as per the mortgage deed)and it was registered document. After expiry of the mortgage period, the plaintiff filed Regular Civil Suit No. 307 of 1985 seeking to redeem the mortgage. However, the defendant took a plea that he was in possession of the property as a tenant and he had advanced certain amount to the plaintiff which was to be adjusted towards the rent amount and the mortgage deed did not reveal the real transaction between the parties. According to him, he, being the tenant, could not be evicted from the shop. The Trial Court accepted the plea of the defendant and dismissed the suit. The plaintiff filed Regular Civil Appeal No. 223 of 1990 and in that appeal, the plaintiff-appellant filed an application seeking leave to produce certain documents and to adduce certain evidence to prove that in 1975 also he had mortgaged this property in

favour of the brother of the defendant and the defendant and his brother had come in possession of the suit premises on the basis of that mortgaged deed and not as tenants. However, the appellate court refused to grant permission under order 41 Rule 27 of the Civil Procedure Code. The Court below held that as the mortgage deed of 1975 was not produced and proved, the plaintiff had failed to prove that the said transaction was a transaction of mortgage. The appeal was also dismissed.

5 In the Second Appeal, certain substantial questions of law have been raised and therefore, the appeal was admitted. The plaintiff has filed Civil Application No.134 of 1996 before this Court also seeking permission to produce certain documents including the mortgage deed dated 27th January 1975 and the statement of brother of defendant before the City Survey Officer that the mortgage was redeemed. It is pointed out by the learned counsel for the plaintiff-appellant that practically no evidence has been lead by the defendant to show that he was in occupation of the premises as a tenant and the Court below accepted the plea of tenancy in the teeth of

the registered mortgage deed executed by the plaintiff in favour of the defendant.

6 Taking into consideration the facts and circumstances, the learned counsel for both the parties conceded that it will be necessary to adduce additional oral and documentary evidence to find out the truth.

7 Therefore, with consent of the learned counsel for the parties, the civil application no. 134 of 1996 is allowed and the documents as per the list are allowed to be produced.

8 With consent of the learned counsel for the parties, the judgment passed by the 1st Appellate Court in Regular Civil Appeal No. 223 of 1990 is hereby set aside and the said appeal is remanded back to the District Judge, Kolhapur to hear and to decide the same afresh as per law. The documents now produced before this Court as per Civil Application No.134 of 1996 shall be sent to the District Court. The plaintiff-appellant shall be permitted to lead additional evidence to prove the said documents. The defendant shall also, if he so desires, be permitted to lead additional evidence in respect of the

tenancy. The appeal is disposed of accordingly. The parties shall appear before the District Court, Kolhpaur on 9th October 2009.

9 As the original dispute is very old and the First Appeal itself was of 1990, the Principal District Judge, Kolhapur shall see that as far as possible, the appeal is heard and disposed of finally within three months from the date on which the parties shall appear before him.

10 Record and proceedings be returned to District Court.

(J.H.BHATIA, J.)